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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 NETTIE REAY,

11 Petitioner,

No. CIV S-05-0356 GEB DAD P

12 vs.

13 GLORIA HENRY, Warden,

14 Respondents.

FINDINGS AND RECOMMENDATIONS

15 \_\_\_\_\_/  
16 Petitioner is a state prisoner proceeding pro se with an application for a writ of  
17 habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges a judgment of conviction for  
18 second degree murder entered against her on October 14, 1998, in the Sacramento County  
19 Superior Court. She seeks relief on the grounds that: (1) the state courts' retroactive application  
20 of the decision in People v. Anderson, 28 Cal. 4th 767 (2002) to her appeal violated her right to  
21 due process; (2) her due process rights to present a defense and to a fair trial were violated when  
22 the state courts failed to grant her a new trial at which she could take advantage of the decision in  
23 Anderson; (3) her right to due process was violated when the trial court failed to instruct the jury  
24 in her case on mistake of fact; and (4) her statements to police should have been excluded from  
25 evidence at her trial because they were obtained in violation of Miranda v. Arizona, 384 U.S. 436

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1 (1966) and were coerced. Upon careful consideration of the record and the applicable law, the  
2 undersigned will recommend that petitioner's application for habeas corpus relief be denied.

3 PROCEDURAL AND FACTUAL BACKGROUND<sup>1</sup>

4 Petitioner was convicted of the second degree murder of Angel Dixon following a  
5 jury trial. (Reporter's Transcript on Appeal, lodged in Travis Reay Habeas, Case No. CIV S-02-  
6 2067 GEB DAD P (hereinafter RT), at 1479.) Petitioner's husband and co-defendant, Travis  
7 Reay, was convicted of first degree murder in the death of Angel Dixon. (Id. at 1482.) On  
8 October 14, 1998, petitioner was sentenced to 16 years to life in state prison. (Pet. at consecutive  
9 p. 1.) Petitioner filed a timely appeal in the California Court of Appeal for the Third Appellate  
10 District. (Lodged Doc. 23 filed in Travis Reay Habeas, Case No. Civ. S-02-2067 GEB DAD P).  
11 The appellate court reversed petitioner's judgment of conviction, finding that there was jury  
12 instruction error at her trial. (Opinion at 1.)

13 Respondent filed a timely petition for review in the California Supreme Court.  
14 (Lodged Doc. 25, filed July 5, 2005.) The California Supreme Court granted respondent's  
15 petition and transferred review of the matter to the Court of Appeal with directions to vacate its  
16 prior decision and reconsider the case in light of the then-recently decided People v. Anderson,  
17 28 Cal. 4th 767 (2002). (Lodged Doc. 7 filed in Travis Reay Habeas, Case No. Civ. S-02-2067  
18 GEB DAD P). Upon review, the California Court of Appeal vacated its prior decision,  
19 determined that the decision in Anderson was retroactive, and upheld petitioner's judgment of  
20 conviction. (Opinion at 2.) In its opinion, the state appellate court described the facts underlying  
21 petitioner's conviction as follows:

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23 <sup>1</sup> The following summary is drawn from the August 21, 2003 opinion by the California  
24 Court of Appeal for the Third Appellate District (hereinafter Opinion), designated as Lodged  
25 Document 10 in the habeas corpus action filed by petitioner's co-defendant Travis Reay, Case  
26 No. CIV S-02-2067 GEB DAD P (hereinafter Travis Reay Habeas). This court presumes that the  
state court's findings of fact are correct unless petitioner rebuts that presumption with clear and  
convincing evidence. 28 U.S.C. § 2254(e)(1); Davis v. Woodford, 384 F.3d 628, 638 (9th Cir.  
2004). Petitioner has not attempted to overcome the presumption with respect to the underlying  
events. The court will therefore rely on the state court's recitation of the facts.

1 We revisit in part the appeals of defendants Travis Reay and Nettie  
2 Reay (Travis and Nettie or collectively defendants) on remand  
from the California Supreme Court.

3 In a prior unpublished decision, we reversed the judgment against  
4 Nettie because the trial court refused to give an instruction on  
duress for lack of evidence to support the defense, and affirmed as  
5 modified the judgment against Travis. The People petitioned the  
Supreme Court for review of this issue, which was granted. A  
6 separate petition by Travis was denied.

7 The Supreme Court has directed us to “vacate [our] decision and to  
reconsider the cause in light of People v. Anderson (2002) 28  
8 Cal.4th 767” (hereafter Anderson), which held inter alia that duress  
is not a defense to the crime of murder under Penal Code section  
26.<sup>2</sup>

9 Having done so, we determine that Anderson is retroactive.  
10 Accordingly, we shall affirm the judgment of conviction as to  
Nettie except to modify her restitution fine. We shall also affirm  
11 the judgment of conviction of Travis with a modification as to  
restitution.

## 12 FACTUAL BACKGROUND

13 On Monday, August 16, 1993, at 1 p.m., law enforcement officers  
14 found Angel Dixon, dead, in a field near the Sacramento Airport.  
She had been stabbed more than 50 times, five of the wounds  
15 caused her death, one to the neck and two to each lung. It was  
determined that she had probably died more than a day earlier; she  
16 might have been killed as early as on the previous Sunday morning.

17 About three and one-half years later, the Sheriff’s Department  
received a telephone call from a person who asserted the  
18 defendants were responsible for the killing. On October 16, 1996,  
deputy sheriffs interviewed Nettie. She implicated Scott DeGraff.  
19 She and DeGraff, who was granted use immunity for his testimony,  
testified at trial.

20 DeGraff testified to the following account of the killing. He was  
visiting Travis’s house; Nettie was also there. Angel Dixon  
21 arrived. As DeGraff came back from the bathroom she left. Travis  
told DeGraff to follow her and tell her that “they were only  
22 kidding” and to ask her to return. He did so. When she returned  
with DeGraff, one of the defendants locked the door.

23  
24 The defendants, yelling, confronted Dixon about “itching her arm”  
25 (apparently an idiom for using drugs) in the presence of Travis’s

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26 <sup>2</sup> All further section references are to the Penal Code unless otherwise specified.

1 nephew. Dixon attempted to leave. Nettie struck Dixon, causing  
2 her to fall to the floor and then hit her in the nose. Travis left the  
3 room, returned with handcuffs, and, with Nettie's assistance,  
4 cuffed Dixon's hands behind her back. On cross-examination  
5 DeGraff conceded that his account in a statement to the police that  
6 Nettie continued to hit Dixon for a few minutes was more accurate.  
7 He said he thought Dixon's nose was broken and that she bled  
8 profusely.

9 Travis asserted he was afraid that Dixon would retaliate against his  
10 family or his dog through Dixon's association with a motorcycle  
11 gang. He informed DeGraff that he needed to leave the area to  
12 avert retaliation. The defendants took Dixon to DeGraff's car and,  
13 following directions from Travis, DeGraff drove to the place where  
14 Dixon's body was found.

15 The defendants took Dixon out of the car. Nettie struck Dixon  
16 several times. In direct examination, DeGraff said the defendants,  
17 holding Dixon's arms, pulled her along into the field to an area of  
18 bushes. On cross-examination, impeached with a statement to  
19 police officers, DeGraff said Travis pulled Dixon into the field.  
20 On re-direct examination DeGraff went back to his account of  
21 Nettie also pulling Dixon. DeGraff stayed by the car. Travis threw  
22 Dixon to the ground and got on top of her. DeGraff saw him  
23 making striking motions with an object as Nettie held Dixon down.

24 Eventually, the defendants returned to the car. DeGraff saw  
25 movement in the brush where Dixon was. Dixon got up and ran  
26 toward the car. Nettie said: "I don't think she's dead." Dixon,  
bloodied, reached the car and beseeched DeGraff to help her. He  
pushed her away, saying he did not "want anything to do with it."  
On direct examination DeGraff testified that the defendants  
grabbed Dixon and dragged her back further into the bushes. On  
cross-examination DeGraff said he looked away. On redirect  
examination he agreed with his statement to the police that on the  
second occasion, Nettie pushed Dixon to the ground.

On direct examination DeGraff testified that at some point during  
the first or second assault in the bushes Travis asked Nettie to help  
because his knife was stuck. Nettie kneeled or stepped on Dixon's  
back and Travis pulled the knife out. On cross-examination  
DeGraff testified that he did not see Nettie stand on Dixon, that he  
saw Travis put his foot on Dixon's back during the second assault  
in the bushes, and that after he returned to the car Travis said the  
knife had gotten stuck in Dixon.

Eventually the defendants returned to DeGraff's car and he drove  
to a liquor store in their neighborhood. Travis said he had to get  
rid of the knife and he put it in a garbage can. DeGraff then drove  
them to the house of a relative of Nettie. They went into the house  
for a short time, then they went to a smaller detached residence in

1 the backyard. Nettie told DeGraff where a hose was located and he  
2 washed the blood off of the car. DeGraff then left with his car and  
did not see either defendant for a couple of months.

3 On cross-examination DeGraff testified that after the killing they  
4 had first gone to the house of Travis Reay's mother. DeGraff said  
that Travis's mother had acted hysterical and Travis had struck her.  
5 After they arrived at the second house, Nettie was upset and asking  
Travis, "why did you do it?" He was angered and struck her in the  
6 nose and in the stomach, causing her to drop to her knees, gasping.

7 Nettie testified at trial. Her account of the killing differs from that  
of DeGraff as to some details. She assaulted Dixon at Travis's  
8 house because he told her to "whip her ass." She went to  
DeGraff's car because she was told to do so. When they arrived at  
9 the field Travis removed the handcuffs from Dixon and told her  
she had 10 seconds to run. Dixon ran off and Travis ran after her.  
10 Dixon went down out in the field and Travis was on top of her,  
hitting her. After about five minutes he told Nettie to come to him.  
11 She went and saw Dixon lying "full of blood." Travis had two  
knives. He handed one to her and told her to "stick" Dixon. She  
12 did so three or four times, once in the stomach, the others in the  
legs. She did not think Dixon was alive.

13 When she walked back to the car Dixon got up and started to run.  
Travis ran after Dixon and stabbed her again. She did not  
14 "remember" Dixon coming to the car as Degraff had testified.  
When Travis came back to the car he said the knife was stuck and  
15 he could not get it out.

16 The first place they went after the killing was to Nettie's mother's  
house. They washed the car off and then walked to her cousin's  
17 house. She gave the handcuffs to her cousin to dispose of, but  
Travis asked what she was doing and she took them back. They  
18 walked to a donut shop to meet Travis's mother. In the parking lot  
Nettie became emotional and Travis struck her. They went to his  
19 house and she went straight to the bedroom.

20 Nettie Reay also testified on direct examination that the reason she  
beat Dixon and later stabbed her was because she was afraid of  
21 disobeying Travis's directions. She believed that if she did not  
beat Dixon she would be beaten and that if she did not stab Dixon  
22 she also would be laying in that field. She testified that her father  
abused her mother. She testified that since about 13 she had  
23 cohabited with a man who beat her regularly and severely until the  
relationship ended in October 1992. She met Travis in January  
24 1993 and commenced a relationship with him. He soon began to  
slap her and push her around and on one occasion before the killing  
25 beat her severely. He hit her two, three, sometimes four times a  
month. (Seven or eight months after killing Dixon they married.)  
26 He beat her up in front of his mother, who attended the trial.

1 On cross-examination Nettie was impeached with statements that  
2 she had given law enforcement officers. She denied she told them  
3 she had chased Dixon after the first stabbing episode and stabbed  
4 her again. She conceded the officers asked if she had been forced  
5 to participate and she did not indicate she had been. She conceded  
6 she had beaten Dixon in part because she was angry about her drug  
7 use in the presence of Travis's nephew. She admitted saying she  
8 wanted to accompany Travis to make sure he did not engage in  
9 sexual conduct with Dixon. If he had tried that she would have  
10 told him no. She conceded she told the detectives she did not  
11 know why she stabbed Dixon and that she agreed with their  
12 statement: "You just did it because you wanted to be part of the  
13 group[.]"

14 Charlotte Scharp, DeGraff's fiancé, testified that in the spring of  
15 1993, after she had stopped dating Travis, he invited her to his  
16 house. When she arrived he handcuffed her hands behind her back  
17 and Travis and another man abused her, squirting water on her,  
18 pushing her from one to the other, and smacking and kicking her.

19 Linda Arnell, Nettie's mother, testified she was awakened in the  
20 middle of the night in August 1993 by her daughter, who told her  
21 she needed to park DeGraff's car in her garage because it had  
22 blood on it or in it. Nettie said DeGraff and Travis were with her.  
23 Arnell denied the request but said she could use the hose to wash  
24 the car off.

25 Connie Teeters, Nettie's cousin, testified that in mid-August 1993,  
26 when she was 14 years old and living near Arnell's house, Nettie  
made a noise at her window one night between midnight and 3 a.m.  
Teeters went to the window and saw Travis and Nettie, alone.  
Nettie said: "we just killed somebody." She handed Teeters a pair  
of handcuffs and said to hide them or throw them away. Teeters  
threw them in her trash can. At this point Travis said: "What are  
you doing?" Nettie told Teeters to return the handcuffs. She did  
so.

Connie Teeters's mother, Nettie's aunt, Doris Teeters, testified that  
the day before the discovery of Dixon's body was announced on  
the evening news, her niece told her of the killing. Her account of  
the conversation is consistent with the broad outline of Nettie's  
trial testimony. Doris Teeters said that Nettie asked her if Connie  
Teeters talked to her about seeing her the night before.

Nettie adduced the opinion testimony of two expert witnesses  
concerning the battered women's syndrome. Dr. Linda Barnard, a  
licensed marriage and family child counselor, opined that Nettie  
suffered from this syndrome at the time of the Dixon killing. A  
woman in this condition believes there is no escape and copes by  
choosing submissive behaviors. Symptoms include depression,

1 flashbacks, startled response, and hypervigilance. Nettie  
2 demonstrated these typical symptoms.

3 She testified that Nettie does not cope with domestic violence well,  
4 “she just goes downhill pretty quickly into depression and into  
5 compliance.” She is prone to enter a disassociative state, in which  
6 the psyche protects itself from trauma by emotional numbness:  
7 “she finally just sort of gave up and just didn’t feel.”

8 Dr. Barnard testified that Nettie only told her of two specific  
9 instances of battery by Travis before the killing, one in February  
10 and one in March 1993. However, as a rule she does not ask about  
11 every instance of battery when doing an interview.

12 Dr. Phyllis Kaufman, a licensed clinical psychologist and social  
13 worker, opined that Nettie suffers from post-traumatic stress  
14 disorder, consistent with the battered women’s syndrome, as a  
15 result of witnessing domestic violence as a child and being battered  
16 from age 13 on. Emotional stress impairs her judgment and an  
17 excess of stress causes a disassociative state in which she is not  
18 able to make effective judgments and she becomes impulsive and  
19 confused. When she cannot cope with stress she suffers loss of  
20 cognitive control: “Loss of intellectual ability to understand what  
21 she is doing, that ability to look at one’s self and be in control of  
22 one’s behavior. She loses that. She does not know what she is  
23 doing. She becomes a robot and takes orders from others.”

24 Travis did not testify, nor did he call his mother as a witness. He  
25 called Stephanie Schaefer, who testified that she was at his house  
26 from 6 or 7 p.m. on the night of August 15, 1993. Schaefer said  
that Nettie was there when she arrived but left an hour later.  
Schaefer spent the night, sleeping on the living room sofa, and  
Travis did not leave his house that night. Schaefer’s account of the  
evening of August 15, 1993, was corroborated by testimony of  
David Coe, who also said he spent that night in the living room.

19 (Id. at 1-10.)

20 After her conviction was affirmed by the state appellate court, on September 23,  
21 2003, petitioner filed a timely petition for review in the California Supreme Court. (Lodged Doc.  
22 30.) That petition was summarily denied by order dated November 25, 2003. (Lodged Doc. 31.)

## 23 ANALYSIS

### 24 I. Standards of Review Applicable to Habeas Corpus Claims

25 A writ of habeas corpus is available under 28 U.S.C. § 2254 only on the basis of  
26 some transgression of federal law binding on the state courts. See Peltier v. Wright, 15 F.3d 860,

1 861 (9th Cir. 1993); Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v.  
2 Isaac, 456 U.S. 107, 119 (1982)). A federal writ is not available for alleged error in the  
3 interpretation or application of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991);  
4 Park v. California, 202 F.3d 1146, 1149 (9th Cir. 2000); Middleton, 768 F.2d at 1085. Habeas  
5 corpus cannot be utilized to try state issues de novo. Milton v. Wainwright, 407 U.S. 371, 377  
6 (1972).

7 This action is governed by the Antiterrorism and Effective Death Penalty Act of  
8 1996 (“AEDPA”). See Lindh v. Murphy, 521 U.S. 320, 336 (1997); Clark v. Murphy, 331 F.3d  
9 1062, 1067 (9th Cir. 2003). Section 2254(d) sets forth the following standards for granting  
10 habeas corpus relief:

11 An application for a writ of habeas corpus on behalf of a  
12 person in custody pursuant to the judgment of a State court shall  
13 not be granted with respect to any claim that was adjudicated on  
the merits in State court proceedings unless the adjudication of the  
claim -

14 (1) resulted in a decision that was contrary to, or involved  
15 an unreasonable application of, clearly established Federal law, as  
determined by the Supreme Court of the United States; or

16 (2) resulted in a decision that was based on an unreasonable  
17 determination of the facts in light of the evidence presented in the  
State court proceeding.

18 See also Penry v. Johnson, 532 U.S. 782, 792-93 (2001); Williams v. Taylor, 529 U.S. 362  
19 (2000); Lockhart v. Terhune, 250 F.3d 1223, 1229 (9th Cir. 2001). If the state court’s decision  
20 does not meet the criteria set forth in § 2254(d), a reviewing court must conduct a de novo review  
21 of a habeas petitioner’s claims. Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008). See  
22 also Frantz v. Hazey, 513 F.3d 1002, 1013 (9th Cir. 2008) (en banc) (“[I]t is now clear both that  
23 we may not grant habeas relief simply because of § 2254(d)(1) error and that, if there is such  
24 error, we must decide the habeas petition by considering de novo the constitutional issues  
25 raised.”).

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1           The court looks to the last reasoned state court decision as the basis for the state  
2 court judgment. Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004). If the last reasoned  
3 state court decision adopts or substantially incorporates the reasoning from a previous state court  
4 decision, this court may consider both decisions to ascertain the reasoning of the last decision.  
5 Edwards v. Lamarque, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc). Where the state court  
6 reaches a decision on the merits but provides no reasoning to support its conclusion, a federal  
7 habeas court independently reviews the record to determine whether habeas corpus relief is  
8 available under section 2254(d). Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003); Pirtle  
9 v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002); Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir.  
10 2000). When it is clear that a state court has not reached the merits of a petitioner’s claim, or has  
11 denied the claim on procedural grounds, the AEDPA’s deferential standard does not apply and a  
12 federal habeas court must review the claim de novo. Nulph v. Cook, 333 F.3d 1052, 1056 (9th  
13 Cir. 2003).

## 14 II. Petitioner’s Claims

### 15 A. Retroactive Application of People v. Anderson

16           Petitioner’s first claim is that the California Court of Appeal violated her right to  
17 due process in holding that the decision of the California Supreme Court in People v. Anderson  
18 was retroactive and applicable to her appeal. She contends that “due process bars courts from  
19 applying a novel construction of a criminal statute to conduct that neither the statute nor any prior  
20 judicial decision has fairly disclosed to be within its scope.” (Attachment to Pet. at 4.) Petitioner  
21 argues that “the Supreme Court’s decision was an unexpected and sharp departure from existing  
22 law, and at odds with the plain language of the relevant statute, thus denying the due process  
23 right to ‘fair warning . . . of what the law intends to do if a certain line is passed.’” (Id.)

24           In her brief filed in the California Court of Appeal after the remand from the  
25 California Supreme Court, petitioner argued that Anderson could not be applied retroactively to

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1 her case without violating her state and federal right to due process. (Lodged Document 29 at 5-

2 6.) The California Court of Appeal rejected this argument, reasoning as follows:

3        Nettie was charged with murder and convicted by jury of murder in  
4        the second degree. On appeal to this court, she contended the trial  
5        court committed reversible error by failing to give her requested  
6        instructions on the defense of duress. The trial court reasoned  
7        there was legally insufficient evidence of immediacy to warrant a  
8        duress instruction.

9        In a prior unpublished decision, we agreed with Nettie, finding  
10       there was sufficient evidence to warrant giving the instruction and  
11       reversed the judgment.<sup>3</sup> The People petitioned for review of that  
12       decision and the Supreme Court directed us to vacate our decision  
13       and reconsider the cause in light of Anderson, *supra*, 28 Cal.4th  
14       767. We do so.

15       In Anderson, the California Supreme Court held the defense of  
16       duress under section 26, subdivision Six, is not a defense to the  
17       crime of murder and therefore declined to decide whether the  
18       evidence in that case would have warranted duress instructions.  
19       (28 Cal.4th at p. 785.)

20       An appellate court reviews the trial court's result, not its reasons.  
21       (Triple A. Management Co. v. Frisone (1999) 69 Cal.App.4th 520,  
22       535.) In light of the holding in Anderson, we conclude the trial  
23       court did not err by failing to give the requested instruction on  
24       duress.

## 25       2. Retroactivity of Anderson

26       In a supplemental brief filed on remand, Nettie contends that  
27       Anderson, *supra*, may not be applied retroactively without  
28       violating her due process protections under the United States and  
29       California Constitutions. The People contend this court may  
30       follow the instructions of the California Supreme Court to  
31       reconsider its decision in light of Anderson without violating due  
32       process protections because Anderson did not change a settled rule  
33       on which the parties below relied. We agree with the People.

34       Under basic principles of due process, a criminal statute must give  
35       “fair warning” of the conduct it makes criminal. (Bouie v.  
36       Columbia (1964) 378 U.S. 347, 350 [12 L.Ed.2d 894, 898].) The  
37       right of fair warning may be violated as much by vague statutory  
38       language as by the retroactive application of “an unforeseeable  
39       judicial enlargement of a criminal statute ....” (*Id.* at p. 352-353

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40       <sup>3</sup> The legal question decided in Anderson was not raised by the parties nor addressed by  
41       this court in our unpublished opinion.

1 [12 L.Ed.2d at p. 899]; Rogers v. Tennessee (2001) 532 U.S. 451,  
2 459-460 [149 L.Ed.2d 697, 706].) Thus, while judicial decisions  
3 are generally given retroactive effect (Smith v. Rae-Venter Law  
4 Group (2002) 29 Cal.4th 345, 372; Newman v. Emerson Radio  
5 Corp. (1989) 48 Cal.3d 973, 978), “[i]f a judicial construction of a  
6 criminal statute is ‘unexpected and indefensible by reference to the  
7 law which had been expressed prior to the conduct in issue,’ it  
8 must not be given retroactive effect.” (Bouie v. Columbia, *supra*,  
9 378 U.S. at p. 354 [12 L.Ed.2d at p. 900], quoting Hall, General  
10 Principles of Criminal Law (2d ed.1960) p. 61; Rogers v.  
11 Tennessee, *supra*, 532 U.S. at p. 462 [149 L.Ed.2d at p. 708].)

12 Although a judicial gloss may provide the requisite level of clarity  
13 on an otherwise uncertain statute, “due process bars courts from  
14 applying a novel construction of a criminal statute to conduct that  
15 neither the statute nor any prior judicial decision has fairly  
16 disclosed to be within its scope....” (United States v. Lanier (1997)  
17 520 U.S. 259, 266 [137 L.Ed.2d 432, 442-443].) “[T]he  
18 touchstone is whether the statute, either standing alone or as  
19 construed, made it reasonably clear at the relevant time that the  
20 defendant’s conduct was criminal.” (*Id.* at p. 267 [137 L.Ed.2d at  
21 p. 443].)

22 In holding that the defense of duress under section 26, subdivision  
23 Six does not apply to the crime of murder, the court in Anderson  
24 reviewed the history of that defense both at common law and under  
25 section 26.<sup>4</sup> The defendant had argued that the qualifying phrases  
26 “unless the crime be punishable with death” did not apply because  
his offense was not so punishable. Accordingly, he could assert a  
duress defense. The court disagreed saying that “[t]he exception  
for a crime punishable with death refers to a crime punishable with  
death as of 1850” when all homicide was punishable with death.  
(28 Cal.4th at p. 774.)

The court explained that section 26 codified the common law and  
“[a]t common law, the general rule was, and still is today, what  
Blackstone stated: duress is no defense to killing an innocent

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<sup>4</sup> Section 26 provides in pertinent part:

“All persons are capable of committing crimes except those  
belonging to the following classes:

“.....

“Six-Persons (unless the crime be punishable with death) who  
committed the act or made the omission charged under threats or  
menaces sufficient to show that they had reasonable cause to and  
did believe their lives would be endangered if they refused.”

1 person. ‘Stemming from antiquity, the nearly “unbroken tradition”  
2 of Anglo-American common law is that duress never excuses  
3 murder, that the person threatened with his own demise “ought  
rather to die himself, than escape by the murder of an innocent.”’  
[Citations.]” (Anderson, supra, 28 Cal.4th at p. 772, fn. omitted.)

4 The court traced the legislative history of the defense of duress  
5 under section 26 back to 1850 when all murder was punishable by  
death. (See Stats. 1850, ch. 99, § 21, p. 231.) Finding the relevant  
6 California case law construing section 26 “sparse” and  
“inconclusive,”<sup>5</sup> the court concluded that “like many of California’s  
7 early penal statutes [citations], section 26 effectively adopted the  
common law, although the Legislature used a problematic method  
8 in which to do so.” (Id. at pp. 774.) While impliedly  
acknowledging that section 26 is ambiguous, the court declined to  
9 apply the rule of lenity (see People v. Avery (2002) 27 Cal.4th 49,  
57-58), which “compels courts to resolve true statutory ambiguities  
10 in defendant’s favor,” because it found “the possible interpretations  
of section 26 do not stand in relative equipoise.” (28 Cal.4th at p.  
11 780.)<sup>6</sup> The court also found important that when section 26 was  
amended in 1976 and 1981,<sup>7</sup> “there was no long-standing and  
12 consistent judicial interpretation that duress was a defense to some  
but not all murder, only fleeting dicta in a single intermediate

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13  
14 <sup>5</sup> In concluding the relevant California case law is sparse and inconclusive, the Court  
looked to the decisions in People v. Martin (1910) 13 Cal.App. 96, 102; People v. Petro (1936)  
15 13 Cal.App.2d 245, 247-248; People v. Moran (1974) 39 Cal.App.3d 398, 417; People v. Son  
(2000) 79 Cal.App.4th 224, 232-233; and Tapia v. Roe (9th Cir.1999) 189 F.3d 1052, 1057.  
16 (Anderson, supra, 28 Cal.4th. at p. 773.)

17 <sup>6</sup> Under the court’s construction of section 26, the phrase “unless the crime be punishable  
with death” is interpreted by the addition of a modifying clause to mean “a crime punishable with  
18 death as of 1850 . . . .” (28 Cal.4th at p. 774.) In 1850, there was only one form of murder and  
“[t]he punishment of any person convicted of the crime of murder shall be death.” (Stats.1850,  
19 ch. 99, § 21.) Hence, in 1850, the defense of duress, which applied only to “a crime not  
punishable with death,” did not apply to murder. (Stats.1850, ch. 99, § 10.) Beginning in 1857,  
20 however, murder was divided into degrees, and only first degree murder was punishable with  
death. (Stats.1856, ch. 139, § 2, p. 219.) With this change in the law of murder, the application  
21 of the defense of duress became problematic. That problem remains under the current law of  
murder. As Justice Kennard reasoned in her concurring and dissenting opinion in Anderson, the  
22 statute defining duress could also be interpreted as inapplicable only to the form of murder  
punishable with death. (28 Cal.4th at pp. 786-787.) Anderson resolved this perceived ambiguity  
23 in the statute’s application by reading into section 26 a limitation not expressed in the statutory  
language, i.e. “as of 1850.”

24 <sup>7</sup> The amendments deleted two classes of persons from the provisions of section 26 that  
25 the original statute had made incapable of committing crimes. (Stats.1976, ch. 1181, § 1, p. 5285  
[married women acting under threats by their husbands]; Stats.1981, ch. 404, § 3, p. 1592  
26 [lunatics and insane persons].)

1 appellate court decision that duress was a defense to all murder  
2 when there was no death penalty.” (28 Cal.4th at p. 780.)

3 In short, prior to Anderson, there was no firmly established rule  
4 holding duress applicable only to certain forms of murder. To the  
5 contrary, as the court in People v. Pena (1983) 149 Cal.App.3d  
6 Supp. 14, understood the law, “it appears settled that the duress  
7 defense is available to a defendant charged with any crime except  
8 one which involves the taking of the life of an innocent person.”  
9 (Id. at p. 22, orig. emph.; see also People v. Martin, supra, 13  
10 Cal.App. at p. 102 [citing section 26 and Blackstone, the court  
11 stated “[i]t has ever been the rule that necessity is no excuse for  
12 killing an innocent person.”].) Likewise, referencing section 26,  
13 Witkin states: “The defense of coercion is generally held  
14 unavailable where the crime is homicide; i.e., the threat even of  
15 death to oneself does not excuse the killing of another innocent  
16 person.” (1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000)  
17 Defenses, § 54, p. 390.)

18 While five cases mention the defense of duress under section 26,  
19 none of those cases address and resolve the legal question resolved  
20 in Anderson, i.e. whether duress is an available defense to  
21 noncapital murder. (See People v. Martin, supra, 13 Cal.App. at p.  
22 102; People v. Petro, supra, 13 Cal.App.2d at pp. 247-248; People  
23 v. Moran, supra, 39 Cal.App.3d at p. 417; People v. Son, supra, 79  
24 Cal.App.4th at pp. 232-233; Tapia v. Roe, supra, 189 F.3d at p.  
25 417; see also People v. Beardslee (1991) 53 Cal.3d 68, 85-86.)

26 The retroactive application of a judicial construction is not barred  
merely because the law is ambiguous and uncertain. (People v.  
Poggi (1988) 45 Cal.3d 306, 327 (Poggi ).) In Carlos v. Superior  
Court (1983) 35 Cal.3d 131 ( Carlos ), the court construed section  
190.2 to require an intent to kill or to aid a killing, when the statute  
did not specify that requirement and was therefore uncertain and  
ambiguous. (Id. at pp. 135, 147; see also Poggi, supra, at p. 327.)  
People v. Anderson (1987) 43 Cal.3d 1104 overruled Carlos in  
part, holding that with respect to the actual killer, the court need  
not instruct on intent to kill in connection with the felony-murder  
special circumstance. (Id. at pp. 1138-1139.) In Poggi, the court  
held Anderson could be applied retroactively, reasoning that “[n]o  
such unforeseeability existed here. Defendant stands convicted of a  
murder that preceded Carlos. Carlos itself concluded that the  
statute was ambiguous with respect to the requirement of intent to  
kill for a felony-murder special circumstance. [Citation.] There  
was ample basis for pre-Carlos foreseeability of a holding that such  
intent is not required for the actual killer. [Citation.]” (Id. at p.  
327.)

Therefore, even though the language of section 26 is ambiguous,  
retroactive application of Anderson, supra, 28 Cal.4th 767, is not  
foreclosed. Neither the case law nor the legislative history severed

1 section 26 from its common law roots. Because those roots  
2 established an unbroken tradition that duress is not a defense to the  
3 killing of an innocent person, the decision in Anderson construing  
4 section 26, consistent with those roots, was neither novel nor  
unforeseeable. Accordingly, we find Anderson may be applied  
retroactively to defendant.

5 (Opinion at 10-17.)

6 The United States Constitution provides that “No State shall . . . pass any . . . ex  
7 post facto Law.” U.S. Const. art. I, § 10. See also Himes v. Thompson, 336 F.3d 848, 854 (9th  
8 Cir. 2003). A law violates the Ex Post Facto Clause of the United States Constitution if it: (1)  
9 punishes as criminal an act that was not criminal when it was committed; (2) makes a crime’s  
10 punishment greater than when the crime was committed; or (3) deprives a person of a defense  
11 available at the time the crime was committed. See Collins v. Youngblood, 497 U.S. 37, 52  
12 (1990). The Ex Post Facto Clause “is aimed at laws that retroactively alter the definition of  
13 crimes or increase the punishment for criminal acts.” Himes, 336 F.3d at 854 (quoting Souch v.  
14 Schaivo, 289 F.3d 616, 620 (9th Cir. 2002)). See also Cal. Dep’t of Corr. v. Morales, 514 U.S.  
15 499, 504 (1995). “An unforeseeable judicial enlargement of a criminal statute, applied  
16 retroactively, operates precisely like an ex post facto law.” Bouie v. City of Columbia, 378 U.S.  
17 347, 353 (1964). Therefore, “[i]f a judicial construction of a criminal statute is ‘unexpected and  
18 indefensible by reference to the law which had been expressed prior to the conduct in issue,’ it  
19 must not be given retroactive effect.” Id. at 353-54 (quoting Hall, General Principles of Criminal  
20 Law (2d ed. 1960), at 61.) When an unforeseeable state-court construction of a criminal statute  
21 is applied retroactively to subject a person to criminal liability for past conduct, “the effect is to  
22 deprive him of due process of law in the sense of fair warning that his contemplated conduct  
23 constitutes a crime.” Id. at 354-55. See also Marks v. United States, 430 U.S. 188, 191 (1977)  
24 (“persons have a [due process] right to fair warning of that conduct which will give rise to  
25 criminal penalties”).

26 /////

1           The state appellate court’s decision correctly identified the relevant federal law  
2 and reasonably applied it to the facts of this case. As explained by the California Court of  
3 Appeal, state law gave petitioner fair notice that the defense of duress was not available to a  
4 criminal defendant charged with murder. Accordingly, the retroactive application of the decision  
5 in Anderson to her case was not “unexpected” or “unforeseeable.” Petitioner’s right to due  
6 process was not violated by the state court’s retroactive application of a California Supreme  
7 Court’s decision which merely confirmed previous holdings that the duress defense was not  
8 available to a murder charge. See, e.g., Hughes v. Borg, 898 F.2d 695, 705 (9th Cir. 1990)  
9 (retroactive application of state court decision did not violate the petitioner’s due process rights  
10 because prior law provided fair warning of the possible result). Cf. Bouie, 378 U.S. at 356 (due  
11 process violation where interpretation given to a state statute by the South Carolina Supreme  
12 Court was “clearly at variance with the statutory language” and had “not the slightest support in  
13 prior South Carolina decisions”); Rabe v. Washington, 405 U.S. 313, 315-16 (1972) (state  
14 obscenity law reversed because it rested on an unforeseeable judicial construction of the statute).  
15 Because the decision of the California Court of Appeal was not contrary to or an unreasonable  
16 application of federal law, petitioner is not entitled to relief on this claim.

17           B. Denial of Due Process and the Right to Present a Defense

18           In her second claim, petitioner alleges that her right to due process and her right to  
19 present a defense were violated because she was not granted a new trial at which she could take  
20 advantage of the ruling in Anderson. She contends that “even if duress was not a complete  
21 defense to the charges against her, petitioner was entitled to a requested instruction on the  
22 relationship between duress, Battered Women’s Syndrome evidence and proof of the mental state  
23 of second degree murder.” (Attachment to Pet at 4.)

24           This claim was presented to the California Court of Appeal in petitioner’s brief  
25 following remand from the California Supreme Court. (Lodged Doc. 29 at 18-21.) The state  
26 appellate court also rejected this claim, reasoning as follows:

1 On remand, Nettie contends that if we conclude Anderson operates  
2 retroactively, she is entitled to a new trial because she did not  
3 receive the benefit of the ruling in Anderson. She argues she is  
4 entitled to instructions relating duress and the Battered Women's  
5 Syndrome (BWS) to the conscious disregard element of implied  
6 malice, a mental state of second degree murder. The People  
7 contend the jury was properly instructed on BWS and the requisite  
8 mental states of murder. We agree with the People.

9 Contrary to Nettie's claim, Anderson did not hold that duress is  
10 relevant to disprove implied malice murder. Rather, it noted "the  
11 circumstances of duress would certainly be relevant to whether the  
12 evidence establishes the elements of implied malice murder. The  
13 reasons a person acted in a certain way, including threats of death,  
14 are highly relevant to whether the person acted with a conscious or  
15 wanton disregard for human life. [Citation.] This is not due to a  
16 special doctrine of duress but to the requirements of implied malice  
17 murder." (Anderson, *supra*, 28 Cal.4th at pp. 779-780; *see also*  
18 People v. Beardslee, *supra*, 53 Cal.3d at pp. 85-86.)

19 The jury was properly instructed under Anderson on the definition  
20 of murder (CALJIC No. 8.10), unpremeditated second degree  
21 murder (CALJIC No. 8.30), implied malice second degree murder  
22 (CALJIC No. 8.31), and the mental states of murder, including  
23 express and implied malice aforethought. (CALJIC No. 8.11).<sup>8</sup>  
24 Additionally, the jury was instructed that "[t]he specific intent or  
25 mental state with which an act is done may be shown by the  
26 circumstances surrounding the commission of the act" (CALJIC  
No. 2.02), and that evidence of BWS, if believed, may be  
considered to determine whether or not Nettie formed the mental  
state necessary for murder.<sup>9</sup>

In closing argument, defense counsel argued that the circumstances  
of the murder, considered in connection with the defense experts'  
testimony regarding Nettie's mental state, showed she was not  
guilty of murder because she did not premeditate, deliberate, or  
harbor malice. He told the jury the experts' testimony showed that  
when the killing occurred, Nettie was in a psychotic disassociative

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<sup>8</sup> This instruction defined the mental state of implied malice as a "killing result[ing] from an intentional act; the natural consequences of the act are dangerous to human life; and the act was deliberately performed with knowledge of the danger to and with conscious disregard for human life."

<sup>9</sup> The jury was instructed that "Evidence, including expert testimony, of Battered Women's Syndrome, has been introduced in this case. Such evidence, if believed, may be considered by you for the purpose of determining whether or not the defendant, Nettie Reay, formed the mental state necessary for murder. Such evidence if believed, may be considered by you in considering the credibility of defendant Nettie Reay."

1 state because she suffered from post-traumatic stress disorder and  
2 BWS resulting from physical abuse by Travis and by earlier abuse  
3 by other men. Counsel reminded the jury of Nettie's fear of Travis,  
4 her belief he would kill her if she did not do as she was told, her  
5 hysteria immediately after the murder, her consistent statements  
6 that she stabbed the victim three or four times to appease Travis  
7 because he handed her the knife and ordered her to "stick" the  
8 victim, her belief that the victim was dead at the time she stabbed  
9 the victim, and that she only inflicted superficial nonfatal wounds.  
10 Counsel also tied the BWS evidence to defendant's submissive  
11 behavior at the time of the crime and at the time she was  
12 questioned by officers.

13 Thus, under the instructions given and counsel's argument, the jury  
14 was adequately informed it could consider the evidence of BWS  
15 and Nettie's fear of Travis as circumstances relevant to whether she  
16 acted with a conscious or wanton disregard for human life.  
17 Anderson allows no more. (28 Cal.4th at p. 780.)

18 Nettie further contends that if defense counsel had known the  
19 Supreme Court would preclude the use of duress as a complete  
20 defense to murder, he would have tried the case differently,  
21 focusing on the effect of Travis's threats on Nettie's state of mind.  
22 We disagree primarily because the record reflects that counsel tried  
23 the case on that very theory, to show the effect of Travis's threats  
24 on Nettie's state of mind. Anderson did not change the law  
25 governing the effect of threats on the issue of malice. Well before  
26 Anderson, the California Supreme Court in People v. Beardslee,  
supra, 53 Cal.3d 68, approved of instructions authorizing the jury  
to consider the effect of death threats on the mental states for first  
and second degree murder. (Id. at pp. 85-86.) So Anderson broke  
no new ground in that regard. Counsel had Beardslee as a  
guidepost and followed it. As Nettie states in her supplemental  
brief, "[i]t was never argued nor was it intended that the defense  
would argue to the jury that because Travis had beaten Nettie she  
should not be found guilty of murder. The defense theory was  
much more complex, and the Battered Women's Syndrome  
evidence was only presented to explain her conduct in the context  
of other defenses which are available to all criminal defendants."  
Thus, defendant concedes she did not present evidence of duress as  
a complete defense to murder. Rather, as previously discussed and  
as summarized in her supplemental brief, counsel presented  
evidence to establish that the "circumstances of duress" affected  
Nettie's mental state. Accordingly, because counsel tried the case  
consistent with Anderson and Beardslee, we conclude there was no  
instructional error and Nettie was not deprived of the benefit of her  
defense theory.

(Opinion at 17-21.)

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1           Petitioner argues that her trial was rendered fundamentally unfair because the jury  
2 was not adequately instructed on how Battered Wife Syndrome and duress affect implied malice.  
3 However, a challenge to jury instructions does not generally state a federal constitutional claim.  
4 See Middleton v. Cupp, 768 F.2d at 1085 (citing Engle v. Isaac, 456 U.S. at 119); Gutierrez v.  
5 Griggs, 695 F.2d 1195, 1197 (9th Cir. 1983). Habeas corpus is unavailable for alleged error in  
6 the interpretation or application of state law. Middleton, 768 F.2d at 1085; see also Lincoln v.  
7 Sunn, 807 F.2d 805, 814 (9th Cir. 1987); Givens v. Housewright, 786 F.2d 1378, 1381 (9th Cir.  
8 1986). Of course, a “claim of error based upon a right not specifically guaranteed by the  
9 Constitution may nonetheless form a ground for federal habeas corpus relief where its impact so  
10 infects the entire trial that the resulting conviction violates the defendant’s right to due process.”  
11 Hines v. Enomoto, 658 F.2d 667, 672 (9th Cir. 1981) (citing Quigg v. Crist, 616 F.2d 1107 (9th  
12 Cir. 1980)). See also Prantil v. California, 843 F.2d 314, 317 (9th Cir. 1988) (To prevail on such  
13 a claim petitioner must demonstrate that an erroneous instruction “so infected the entire trial that  
14 the resulting conviction violates due process.”)

15           The analysis for determining whether a trial is "so infected with unfairness" as to  
16 rise to the level of a due process violation is similar to the analysis used in determining, under  
17 Brecht, 507 U.S. at 623, whether an error had “a substantial and injurious effect” on the outcome.  
18 See Polk v. Sandoval, 503 F.3d 903, 911 (9th Cir. 2007) (standard applied to habeas petition  
19 presenting a jury instruction challenge); McKinney v. Rees, 993 F.2d 1378, 1385 (9th Cir.  
20 1993). In making its determination, this court must evaluate the challenged jury instructions “in  
21 the context of the overall charge to the jury as a component of the entire trial process.” Prantil,  
22 843 F.2d at 317 (quoting Bashor v. Risley, 730 F.2d 1228, 1239 (9th Cir. 1984)). Where, as  
23 here, the challenge is to a failure to give an instruction, petitioner’s burden is “especially heavy,”  
24 because “[a]n omission, or an incomplete instruction is less likely to be prejudicial than a  
25 misstatement of the law.” Henderson v. Kibbe, 431 U.S. 145, 155 (1977). See also Villafuerte  
26 v. Stewart, 111 F.3d 616, 624 (9th Cir. 1997).

1           The California Court of Appeal concluded that petitioner's jury was adequately  
2 instructed on the requisite mental state for a conviction on a murder charge, and on how evidence  
3 of Battered Women's Syndrome should be considered when determining whether or not  
4 petitioner formed the required mental state necessary for conviction on the charge of murder.  
5 The state court's conclusion in this regard is not unreasonable. The jury instructions given at  
6 petitioner's trial were adequate to inform the jury that it could consider petitioner's fear of her  
7 husband and her prior history of abuse in determining whether she acted with implied malice. As  
8 discussed by the California Court of Appeal, petitioner's counsel explained how these jury  
9 instructions were consistent with the theory of the defense during his closing argument.

10           The state appellate court also concluded that petitioner was able to present to the  
11 jury her defense that she lacked the mental state required for a guilty finding on the murder  
12 charge because of her fear of her co-defendant and her prior history of abuse. The state appellate  
13 court's conclusion is consistent with the record before this court. As explained by that court,  
14 petitioner's trial counsel introduced evidence in support of his defense theory and argued that  
15 defense to the jury.

16           The decision of the California Court of Appeal rejecting petitioner's claim that  
17 she was denied due process and the right to present a defense because she was not granted a new  
18 trial at which she could take advantage of the decision in Anderson is not contrary to or an  
19 unreasonable application of federal law. Accordingly, petitioner is not entitled to relief on these  
20 claims.

21           C. Failure to Give a Jury Instruction on Mistake of Fact

22           In petitioner's next claim, she argues that the trial court's "refusal to give a  
23 requested defense instruction on mistake of fact (CALJIC No. 4.35), considered in light of  
24 Anderson, violated petitioner's rights to due process, to trial by jury and to a fair trial." (Attach.  
25 to Pet. at 5.) Petitioner explains that her trial testimony to the effect that she believed the victim

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1 was already dead when she stabbed her “supported allowing the jury to find that petitioner did  
2 not have the mental state necessary for murder – namely, the intent to kill the victim.” (Id.)

3 The California Court of Appeal rejected petitioner’s argument in this regard,  
4 reasoning as follows:

5 On remand from the Supreme Court, Nettie requests that we  
6 reconsider her claim that the refusal to give a requested instruction  
7 on mistake of fact was error. She argues that Anderson contains  
8 reasoning which supports the mistake of fact instruction and that  
9 reconsideration of her instructional claim is warranted because the  
mistake of fact and duress instructions were closely related under  
the defense's theory of the case.<sup>10</sup> Citing California Rules of Court,  
rule 13(b)(2) ( rule 13), the People contend this claim is not  
properly before the court on remand. We agree with the People.

10 On remand, the California Supreme Court ordered that we  
11 reconsider the cause in light of Anderson. Under rule 13,  
12 “[s]upplemental briefs must be limited to matters arising after the  
13 previous Court of Appeal decision in the cause, unless the  
14 presiding justice permits briefing on other matters.” The presiding  
15 justice did not permit briefing on this claim. Because Anderson  
16 did not alter the law governing the defense of mistake of fact, it has  
17 no affect on our prior analysis or conclusion. We therefore decline  
18 to reconsider our decision on this claim. Accordingly, we resolve  
19 her claim as originally presented.

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22 <sup>10</sup> Nettie bases her argument on the fact that Anderson did not disturb the use of duress as  
23 a defense to charges other than murder, i.e. mutilating a corpse. (Health & Saf. Code, § 7052.)  
24 However, defendant was not charged with mutilating a corpse nor did the prosecution rely on that  
25 offense as a legal basis for the lesser included charge of involuntary manslaughter. It was the  
26 defense who urged the jury to find that Nettie committed a lesser and non-homicide offense.  
Defense counsel argued that if the jury found defendant stabbed the victim, believing she was  
already dead, the offense would be assault with a deadly weapon rather than murder, and the jury  
was instructed on the elements of that offense. Under those circumstances, assault with a deadly  
weapon might also provide the basis for a conviction of involuntary manslaughter. (See People  
v. Cameron (1994) 30 Cal.App.4th 591 [killing in commission of dangerous felony without  
malice or intent].) Duress continues to be a viable defense to the crime of assault. However, the  
jury clearly rejected the factual basis for that legal theory. Having convicted Nettie of second  
degree murder, the jury rejected her testimony that she stabbed the victim believing she was  
already dead. Thus, any failure to give a mistake of fact instruction was harmless. (See People  
v. Beardslee, supra, 53 Cal.3d at p. 87.)

1 As originally raised, Nettie contends the trial court erred in failing  
2 to give her requested instruction on mistake of fact, CALJIC No.  
3 4.35.<sup>11</sup>

4 She argues she was entitled to the instruction under section 26,  
5 subdivision Three,<sup>12</sup> because at the time her codefendant told her to  
6 stab Dixon she believed she was already dead. The People reply  
7 that the instruction is unwarranted because she had no basis for  
8 believing that Dixon was dead. We find that Nettie's argument is  
9 unpersuasive and the contention of error is not meritorious.

10 She asserts it is impossible to intend to kill a dead body. (See, e.g.,  
11 People v. Carpenter (1997) 15 Cal.4th 312, 391.) This claim might  
12 apply if the instruction requested pinpointed the effect of a belief  
13 that Dixon was dead on the elements of express malice or intent to  
14 kill. However, if applicable, an instruction on mistake of fact  
15 under section 26 does not merely defease the elements of malice or  
16 intent. It provides a complete defense to murder because if the  
17 asserted belief were true and reasonable, the act would be lawful.

18 However, Nettie's claim of belief, if true, would not render her  
19 conduct lawful. If she actually and reasonably believed Dixon was  
20 dead when stabbed, her conduct would remain unlawful under  
21 theories of vicarious liability or for negligent or reckless causation  
22 of death. Moreover, mutilating a dead body is a felony. (See  
23 Health & Saf. Code, § 7052.)

24 Accordingly, the requested instruction on mistake of fact defense  
25 was unwarranted on the justification tendered.

26 (Opinion at 23-26.)

The California Court of Appeal rejected this jury instruction claim, raised by  
petitioner in the instant petition, on the procedural ground that the issue was not properly before

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<sup>11</sup> Nettie's requested instruction is as follows. "An act committed or an omission made in  
ignorance or by reason of a mistake of fact which disproves any criminal intent is not a crime.  
[¶] Thus a person is not guilty of a crime if she commits an act or omits to act under an actual  
[and reasonable] belief in the existence of certain facts and circumstances which, if true, would  
make the act or omission lawful."

<sup>12</sup> "All persons are capable of committing crimes except those belonging to the following  
classes:

".....

"Three - Persons who committed the act or made the omission  
charged under an ignorance or mistake of fact, which disproves any  
criminal intent."

1 the state appellate court on remand. Petitioner subsequently filed a petition for review in the  
2 California Supreme Court, raising the same claim. (Lodged Doc. 30 at 17.) That petition was  
3 summarily denied. (Lodged Doc. 31.) Accordingly, the decision of the California Court of  
4 Appeal provides the basis for the state court judgment. Avila v. Galaza, 297 F.3d 911, 918 (9th  
5 Cir. 2002) (citing Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991)). Because the California  
6 Court of Appeal rejected petitioner's claim on procedural grounds, and did not reach the merits,  
7 this court will review the claim de novo. Nulph, 333 F.3d at 1056.

8           After an independent review of the record, this court concludes that, under the  
9 circumstances of this case and taking into consideration the Anderson decision, the trial court's  
10 failure to give a jury instruction on mistake of fact did not render petitioner's trial fundamentally  
11 unfair. As explained by the California Court of Appeal, the requested instruction was not  
12 appropriate "on the justification tendered" by petitioner's trial counsel. In any event, any error by  
13 the trial court in rejecting the requested instruction was harmless because the verdict made it  
14 clear that the jury rejected petitioner's testimony that she believed the victim was already dead  
15 when she stabbed her. Accordingly, petitioner is not entitled to relief on this claim.

16           D. Admissibility of Petitioner's Confession

17           Petitioner's final claim is that the introduction into evidence at trial of her  
18 statements to police violated her federal constitutional rights because the statements were  
19 obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966) and were coerced. (Attach. to  
20 Pet. at 5.) She explains:

21           On October 16, petitioner was interviewed for 6 hours while in  
22 police custody. At the time of the interview she was sluggish and  
23 medicated with pills for a bad back. Although she was advised per  
24 Miranda at the beginning of the interrogation, she did not make an  
25 explicit waiver and after one half hour, she requested to stop the  
26 interrogation and request was ignored. The officers told petitioner  
that if she did not talk to them they would bring her family into  
custody and interrogate them while petitioner sat in jail. Petitioner  
told the officers about her medication and began to fall asleep.  
However, the interrogation continued for another four and a half  
hours. The refusal to honor two explicit requests to cut off

questioning, petitioner's physical condition and the threats of officers to arrest her family if she refused to cooperate contributed to coercion and explicitly violated the mandates of Miranda. Her confession should not have been admitted at trial for any purpose.

(Id.)

The California Court of Appeal rejected petitioner's argument that her statements were improperly introduced into evidence, reasoning as follows:

Nettie contends the trial court erred prejudicially in denying her motion for suppression of her extra-judicial confession for violation of the Miranda<sup>13</sup> rule or because the statement was involuntary.

She argues that because the record shows she did not explicitly waive her right to remain silent, told the officers she had taken backache pills, appeared to become sluggish as the interview proceeded, and twice asked to continue the interview until the next day, the trial court was compelled to find her Miranda rights were violated and the confession thereby rendered involuntary. The argument is unpersuasive and the contention of error has no merit.<sup>14</sup>

“It is the function of the trial judge to determine whether the defendant did in fact knowingly and voluntarily waive his right to remain silent and his

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<sup>13</sup> Miranda v. Arizona (1966) 384 U.S. 436 [16 L.Ed.2d 694].

<sup>14</sup> The People submit the contention should be summarily rejected because the record does not contain the tape of the interview and the claim is predicated entirely upon her counsel's remarks made in the hearing on the motion. She replies she will provide the tape as an exhibit under California Rules of Court, rule 10(d), when notified the case has been set for hearing.

The use of that procedure is inappropriate in these circumstances. The claims cannot be evaluated without reviewing the tape. Hence, the failure to specify the exhibit as a part of the clerk's transcript under California Rules of Court, rule 5, renders it impossible for defendant to comply with rule 15, which requires a reference to the record.

Nonetheless, since this is an appeal in a criminal proceeding we have augmented the record and reviewed the tape on our own motion.

1 right to have the assistance of counsel. This  
2 determination is to be made based on the totality of  
3 the circumstances surrounding the interrogation . . .  
4 . The assertion of privilege or its waiver constitutes  
5 a question of fact which can only be decided after  
6 taking into account the special circumstances of  
7 each case . . . . Where the evidence is in conflict,  
8 the trial court's findings in this regard will be  
9 accepted by the appellate court unless it is palpably  
10 erroneous or entirely unworthy of belief . . . .'  
11 (People v. Bestelmeyer (1985) 166 Cal.App.3d 520,  
12 526 [212 Cal.Rptr. 605], citations omitted: People  
13 v. Siripongs (1988) 45 Cal.3d 548, 575 [247  
14 Cal.Rptr. 729, 754 P.2d 1306]; People v. Boyer  
15 (1989) 48 Cal.3d 247, 263 [256 Cal.Rptr. 96, 768  
16 P.2d 610]; People v. Kelly (1990) 51 Cal.3d 931,  
17 950 [275 Cal.Rptr. 160, 800 P.2d 516].) “[T]he  
18 trial court's ruling on a Miranda [ ] issue may not be  
19 set aside by us unless it is “palpably erroneous.””  
20 (People v. Siripongs, *supra*, 45 Cal.3d 548, 575,  
21 *italics omitted.*)” (People v. Bolden (1996) 44  
22 Cal.App.4th 707, 713.)

23 Nettie argues her confession was obtained in violation of her rights  
24 under Miranda because she invoked her right to remain silent when  
25 she asked to adjourn the interrogation until the next day.

26 At the outset of the interrogation she expressly acknowledged  
understanding the Miranda admonition. She then participated in a  
protracted interrogation in which she appears alert, articulate, and  
facile. After the detectives rejected her denial of involvement and  
persistently pressed her to tell the truth and to spare her aunt and  
mother the unpleasantness of an imminent interrogation, she  
appeared distressed. Finally, she asked: “would there be any way  
that I could come back here tomorrow? Because I took some back  
pain pills.” The interrogator expressed sympathy for her but told  
her they were unwilling to put the matter off. She submitted she  
would be “more than willing to come back here and talk to you” in  
the morning and suggested they could pick her up. The  
interrogators told her today is the day and suggested that she had a  
limited opportunity to tell the truth. She then continued with the  
questioning and began to relate incriminating details.

The People suggest the trial court could properly find she did not  
invoke her right to remain silent. We agree that such a  
determination is within the purview of the trial court. As the  
People note, the circumstances are analogous to Bolden, *supra*, 44  
Cal.App.4th at page 713, where the question: “Can I talk to you  
later?” was held not to be invocation of the right to silence.

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1 Nettie also claims her confession should not have been admitted  
2 because it was involuntary.

3 “Involuntary” is a term of art.

4 “The application of the axiom that involuntary  
5 confessions are not admissible is not always a  
6 simple matter; the concept of voluntariness is  
7 multifaceted and has been described as a ‘potential  
8 morass.’ (People v. Disbrow (1976) 16 Cal.3d 101,  
9 112, fn. 12 [127 Cal.Rptr. 360, 545 P.2d 272]; also  
10 see, e.g., 1 LaFave & Israel, Criminal Procedure  
11 (1984) § 6.2, p. 442, listing derogatory commentary  
12 concerning the term ‘voluntary’ in this connection.)  
13 ‘[A] complex of values underlies the stricture  
14 against use by the state of confessions which, by  
15 way of convenient shorthand, this Court terms  
16 involuntary, and the role played by each in any  
17 situation varies according to the particular  
18 circumstances of the case.’ (Blackburn v. Alabama  
19 (1960) 361 U.S. 199, 207 [4 L.Ed.2d 242, 248, 80  
20 S.Ct. 274].)

21 “The reason for excluding involuntary confessions  
22 is to provide the accused with an ‘essentially free  
23 and unconstrained choice’ whether to confess  
24 (Schneckloth v. Bustamonte (1973) 412 U.S. 218,  
25 225-226 [36 L.Ed.2d 854, 93 S.Ct. 2041] ); that is  
26 to say, free of police conduct which is overreaching  
(see Colorado v. Connelly (1986) 479 U.S. 157,  
163-164 [93 L.Ed.2d 473, 482, 107 S.Ct. 515] ).  
Many factors bear on the question. ‘In determining  
whether a defendant's will was overborne in a  
particular case, the [United States Supreme Court]  
has assessed the totality of all the surrounding  
circumstances – both the characteristics of the  
accused and the details of the interrogation.’  
(Schneckloth v. Bustamonte, *supra*, 412 U.S. at pp.  
225-226 [36 L.Ed.2d at p. 862] .)

“The criteria which measure an involuntary  
confession must be discerned in the case law.”  
(Peo. v. Cahill (1994) 22 Cal.App.4th 296, 310-311,  
fn. omitted.)

The only criterion Nettie advances for the claim the police engaged  
in overreaching is a violation of the Miranda strictures. As we  
have rejected that claim, her argument collapses.

Having reviewed the tape, we discern no overreaching police  
conduct and no reason to overturn the trial court's determination

1 the confession was voluntary. Notably lacking in the defendant's  
2 showing is a development of or corroboration of her claim to have  
taken pain pills for her back.

3 The contention the trial court erred in denying her motion to  
4 suppress evidence of the interrogation is without merit.

5 (Opinion at 26-30.)

6 The trial court also reviewed the videotape of petitioner's confession in  
7 addressing a defense pretrial motion to suppress and found that petitioner's statements were  
8 neither coerced nor obtained in violation of Miranda. (RT at 2-3, 19-20.) The trial judge  
9 explained his ruling in denying the motion as follows:

10 The court finds that was a knowing and intelligent waiver of  
11 Miranda rights, that there was no coercion on the part of the police  
statement under the totality of the circumstances.

12 I did note at times during the interview she was crying. However,  
13 there was ample opportunity for her to take breaks, for her to have  
14 water, and I really don't feel there was any overbearing or  
overreaching or any type of intimidation to this witness other than  
15 the officers trying to seek the truth.

16 Both motions are denied in their totality, that is to say, the Miranda  
and the question of the statement not being a voluntary statement  
17 or being an involuntary statement. That motion is denied.

18 (Id. at 19-20.)

19 1. Miranda

20 Petitioner first claims that her statements to police in the course of the  
21 interrogation on October 16, 1996 were obtained in violation of Miranda and should have been  
22 excluded from evidence at her trial. In Miranda, the United States Supreme Court held that  
23 "[t]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from  
24 custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards  
25 effective to secure the privilege against self-incrimination." 384 U.S. at 444. To this end,  
26 custodial interrogation must be preceded by advice to the potential defendant that he or she has

1 the right to consult with a lawyer, the right to remain silent and that anything stated can be used  
2 in evidence against him or her. Id. at 473-74. These procedural requirements are designed “to  
3 protect people against the coercive nature of custodial interrogations.” DeWeaver v. Runnels,  
4 556 F.3d 995, 1000 (9th Cir. 2009). Once Miranda warnings have been given, if a suspect makes  
5 a clear and unambiguous statement invoking his constitutional rights, “all questioning must  
6 cease.” Smith v. Illinois 469 U.S. 91, 98 (1984). See also Miranda, 384 U.S. at 473-74;  
7 Michigan v. Mosley, 423 U.S. 96, 100 (1975); DeWeaver v. Runnels, 556 F.3d at 1001.

8           Petitioner argues that her statements were obtained in violation of Miranda  
9 because she did not make an explicit waiver of her right to remain silent and because the  
10 interrogating officers refused to honor her requests to terminate the interview. She contends that  
11 she invoked her right to remain silent twice: first when she asked the detectives whether she  
12 could come back the next day and, later in the interrogation, when she stated that she did not  
13 want to repeat her story again. (Attach. to Pet. at 5.)

14           This court agrees with the California Court of Appeal that petitioner made an  
15 implied waiver of her right to remain silent when she voluntarily answered the detectives’  
16 questions after being advised of and acknowledging an understanding of her rights as articulated  
17 in the Miranda warning. An express waiver of Miranda rights is not necessary. North Carolina  
18 v. Butler, 441 U.S. 369, 373 (1979); United States v. Younger, 398 F.3d 1179, 1185 (9th Cir.  
19 2005) (“In soliciting a waiver of Miranda rights, police officers need not use a waiver form nor  
20 ask explicitly whether a defendant intends to waive his or her rights”). A valid waiver of rights  
21 may be implied under the circumstances. Specifically, “a suspect may impliedly waive the rights  
22 by answering an officer’s questions after receiving Miranda warnings.” United States v.  
23 Rodriguez, 518 F.3d 1072, 1080 (9th Cir. 2008) (quoting United States v. Rodriguez-Preciado,  
24 399 F.3d 1118, 1127, amended, 416 F.3d 939 (9th Cir. 2005.)) See also North Carolina v.  
25 Butler, 441 U.S. 369-73 (1979) (Waiver can be inferred “from the actions and words of the  
26 person interrogated.”); Bui v. Dipaolo, 170 F.3d 232, 240 (1st Cir. 1999). Under the

1 circumstances presented here, petitioner waived her Miranda rights at the commencement of the  
2 interrogation when, after receiving the appropriate warnings, she stated that she understood her  
3 rights and began to answer the officers' questions.

4           The next question is whether petitioner invoked her right to silence subsequent to  
5 her waiver. Because petitioner's alleged invocations in this regard occurred after she had already  
6 waived her constitutional rights and proceeded with the interrogation, petitioner "bears the  
7 'burden' of cutting off questioning by unambiguously retracting the clear waiver [s]he has  
8 already given." Rodriguez, 518 F.3d at 1079. Invocation of the right to remain silent must be  
9 construed liberally. See Hoffman v. United States, 341 U.S. 479, 486 (1951). Thus, a suspect  
10 need not rely on any special combination of words to invoke the right to silence. Quinn v. United  
11 States, 349 U.S. 155, 162 (1955). See also Miranda, 384 U.S. at 473-74 (a suspect's assertion of  
12 the right to remain silent "in any manner" compels the police to cease questioning). In order to  
13 determine whether a suspect invoked his Fifth Amendment rights, "a court should examine the  
14 entire context in which the claimant spoke." Bradley v. Meachum, 918 F.2d 338, 342 (2d Cir.  
15 1990) (quoting United States v. Goodwin, 470 F.2d 893, 902 (5th Cir. 1972)).

16           With respect to the right to counsel, if a suspect waives his or her Miranda rights  
17 and proceeds with an unassisted interrogation, he or she must thereafter "unambiguously request  
18 counsel" in order to restore his or her right to have an attorney present during the interrogation.  
19 Davis v. United States, 512 U.S. 452, 459, 461 (1994); Rodriguez, 518 F.3d at 1079. This means  
20 that the suspect "must articulate his desire to have counsel present sufficiently clearly that a  
21 reasonable police officer in the circumstances would understand the statement to be a request for  
22 an attorney." Davis, 512 U.S. at 459. Where there has been only an equivocal or ambiguous  
23 assertion of the right to counsel in that context, the attending officer *may* ask questions to clarify

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1 the defendant's wishes, but is not required to do so and may simply “continue questioning until  
2 and unless the suspect clearly requests an attorney.” Id. at 461.<sup>15</sup>

3 The United States Supreme Court “has not yet directly addressed ambiguous  
4 statements in the context of the right to remain silent” and has not applied the Davis standard to  
5 require an unequivocal invocation of the right to remain silent context as it has required for an  
6 invocation of the right to counsel. DeWeaver, 556 F.3d at 1000-01. See also James v. Marshall,  
7 322 F.3d 103, 108 (1st Cir. 2003); Bui, 170 F.3d at 239. Although other circuit courts have  
8 extended the Davis standard to the invocation in the right-to-silence context, the Ninth Circuit  
9 has “declined to decide whether the Davis requirement of a clear and unequivocal invocation  
10 applies to the right to remain silent.” DeWeaver, 556 F.3d at 1001. However, because the  
11 United States Supreme Court has not squarely addressed the issue, a state court decision that  
12 applies the “clear and unequivocal” standard articulated in Davis to a case involving the alleged  
13 invocation of the right to remain silence is not contrary to or an unreasonable application of  
14 federal law under the AEDPA. DeWeaver, 556 F.3d at 1002.

15 The California Court of Appeal concluded that in this case petitioner did not  
16 unambiguously invoke her right to remain silent when she asked whether she could come back  
17 and continue the interview the following day. (Opinion at 28.) In doing so the state appellate  
18 court analogized the situation to a California case in which the question “Can I talk to you later?”  
19 was held not to be an invocation of the right to remain silent. (Id.) Similarly, in response to a  
20 defendant’s argument that he invoked his right to remain silent when he inquired, “Can we talk  
21 about it tomorrow?” the Ninth Circuit has held that the trial court “was not required to interpret  
22 [the] question as an invocation of his right to remain silent.” United States v. Thierman, 678  
23 F.2d 1331, 1335-1336 (9th Cir. 1982). Likewise, a defendant’s request, “Can't we wait until  
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25 <sup>15</sup> However, if a suspect makes an ambiguous statement *prior to* waiving his Miranda  
26 rights, an officer must clarify the meaning of the statement before proceeding with the  
interrogation. Rodriguez, 518 F.3d 1072, 1074 (9th Cir. 2008).

1 tomorrow?" has been deemed an equivocal invocation of his right to cut off questioning. Martin  
2 v. Wainwright, 770 F.2d 918, 923 (11th Cir. 1985), modified by 781 F.2d 185 (11th Cir. 1986),  
3 abrogation on other grounds recognized by Coleman v. Singletary, 30 F.3d 1420 (11th Cir.  
4 1994).

5 In light of the authorities cited above, the state courts in this case could reasonably  
6 determine that petitioner's statement "Would there be any way I could come back here  
7 tomorrow?" was ambiguous with regard to whether petitioner wished to invoke her right to  
8 remain silent. The same is true with respect to petitioner's later statements, approximately  
9 halfway through the interrogation; to wit, "I . . . want to go home. I mean, am I gonna go to jail  
10 tonight?" and "I don't want to go through it again. I don't know." (Lodged Doc. 1, lodged on  
11 March 11, 2009 (hereinafter Interrogation), at 68-69.) None of petitioner's statements to police  
12 rise to the level of a clear and unequivocal invocation of the right to remain silent. See  
13 DeWeaver, 556 F.3d at 1000-02 (state court's decision that petitioner did not invoke his right to  
14 remain silent when he requested to go back to his jail cell and therefore no Miranda violation  
15 occurred was not contrary to federal law). Because petitioner did not unambiguously invoke her  
16 right to remain silent after her waiver of that right, the decision of the California Court of Appeal  
17 that the detectives were not required to stop the interrogation was not contrary to federal law and  
18 should not be set aside. Davis, 512 U.S. at 461; DeWeaver. Accordingly, petitioner is not  
19 entitled to habeas relief with respect to her claim her confession was obtained in violation of  
20 Miranda.

## 21 2. Voluntariness of Confession

22 Petitioner also claims that her confession was involuntary. In this regard,  
23 petitioner identifies several aspects of the interrogation that she claims reflect indicia of coercion:  
24 (1) she was interviewed for six hours; (2) she was sluggish, tired, and medicated with pain pills  
25 during the interview; (3) her Miranda rights were violated during the interrogation; and (4) the  
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1 officers threatened to bring her family “into custody” and interrogate them if she refused to talk  
2 to them. (Attach. to Pet., at 5.)

3           The Constitution demands that confessions be made voluntarily. See Lego v.  
4 Twomey, 404 U.S. 477, 483-85 (1972). Involuntary confessions may not be used to convict  
5 criminal defendants because they are inherently untrustworthy and because society shares “the  
6 deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life  
7 and liberty can be as much endangered from illegal methods used to convict those thought to be  
8 criminals as from the actual criminals themselves.” Spano v. New York, 360 U.S. 315, 320-21  
9 (1959). A confession is voluntary only if it is “‘the product of a rational intellect and a free  
10 will.’” Medeiros v. Shimoda, 889 F.2d 819, 823 (9th Cir. 1989) (quoting Townsend v. Sain, 372  
11 U.S. 293, 307 (1963)). See also Blackburn v. Alabama, 361 U.S. 199, 208 (1960). “The line of  
12 distinction is that at which governing self-direction is lost and compulsion, of whatever nature or  
13 however infused, propels or helps to propel the confession.” Collazo v. Estelle, 940 F.2d 411,  
14 416 (9th Cir. 1991) (en banc) (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)).

15           “There is no ‘talismanic definition of voluntariness’ that is ‘mechanically  
16 applicable.’” Clark v. Murphy, 331 F.3d 1062, 1072 (9th Cir. 2003) (quoting Schneckloth v.  
17 Bustamonte, 412 U.S. 218, 224 (1973)). Rather, voluntariness is to be determined in light of the  
18 totality of the circumstances. See Miller v. Fenton, 474 U.S. 104, 112 (1985); Haynes v.  
19 Washington, 373 U.S. 503, 513 (1963); Beatty v. Stewart, 303 F.3d 975, 992 (9th Cir. 2002).  
20 This includes consideration of both the characteristics of the petitioner and the details of the  
21 interrogation. Schneckloth, 412 U.S. at 226. Relevant circumstances that should be considered  
22 in determining whether a confession was voluntarily made include the following factors: (1) the  
23 youth of the accused; (2) his/her intelligence; (3) the lack of any advice to the accused of his/her  
24 constitutional rights; (4) the length of the detention; (5) the prolonged nature of the questioning;  
25 and (6) the use of any punishment such as the deprivation of food or sleep. Id.; United States v.  
26 Haswood, 350 F.3d 1024, 1027 (9th Cir. 2003).

1 Officials cannot extract a confession “by any sort of threats or violence, nor . . . by  
2 any direct or implied promises, however slight, nor by the exertion of any improper influence.”  
3 Hutto v. Ross, 429 U.S. 38, 30 (1976) (quoting Bram v. United States, 168 U.S. 532, 542-43  
4 (1897)). Therefore, in Lynnum v. Illinois, 372 U.S. 528, 534 (1963), a confession was found to  
5 be coerced by officers’ false statements that state financial aid for defendant’s infant children  
6 would be cut off, and her children taken from her, if she did not cooperate. In Rogers v.  
7 Richmond, 365 U.S. 534, 541-45 (1961), the defendant’s confession was found to be coerced  
8 when it was obtained in response to a police threat to take defendant’s wife, who suffered from  
9 arthritis, into custody. In Spano, 360 U.S. at 323, a confession found to be coerced where police  
10 instructed a friend of the accused to falsely state that petitioner’s telephone call had gotten him  
11 into trouble, that his job was in jeopardy and that loss of his job would be disastrous to his three  
12 children, his wife and his unborn child. See also Miranda, 384 U.S. at 476 (“any evidence that  
13 the accused was threatened, tricked, or cajoled into a waiver [of Fifth Amendment right to remain  
14 silent] will, of course, show that the defendant did not voluntarily waive his privilege”). Neither  
15 physical intimidation nor psychological pressure is permissible. Haswood, 350 F.3d at 1027 (“A  
16 confession is involuntary if coerced either by physical intimidation or psychological pressure.”);  
17 United States v. Tingle, 658 F.2d 1332, 1335 (9th Cir. 1981) (“subtle psychological coercion  
18 suffices . . . at times more effectively ‘to overbear a rational intellect and a free will’”). On the  
19 other hand, “if interrogators obtained a confession after Miranda warnings and a valid waiver, the  
20 confession was likely voluntary.” DeWeaver, 556 F.3d at 1003.

21 This court has reviewed the videotape of the interrogation at issue and concludes  
22 that petitioner’s claim that her confession was involuntary should be rejected.<sup>16</sup> Petitioner’s  
23

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24 <sup>16</sup> By order dated January 28, 2009, this court directed respondent to augment the record  
25 in this case with the videotape of petitioner’s statements to police on October 16, 1996, and any  
26 written transcription thereof. In response to the court’s order, respondent lodged a compact disc  
containing the interrogation at issue and a transcription thereof. This information has been  
reviewed by the court in connection with petitioner’s challenge to the admission into evidence of  
her statements to police.

1 statements, as viewed on the videotape, appear to have been “the product of a rational intellect  
2 and a free will.” Townsend, 372 U.S. at 307. See also Blackburn v. Alabama, 361 U.S. 199, 208  
3 (1960). Petitioner was not a juvenile and she appeared on the videotape to be intelligent and  
4 articulate. She was advised of her Miranda rights at the beginning of the interrogation. Although  
5 the entire detention period was approximately six hours in length, the detectives took several  
6 breaks, including one in which petitioner was allowed to sleep for at least two hours. Petitioner  
7 was not deprived of any food or water, and she was not promised leniency in exchange for a  
8 confession. She was not shackled, handcuffed, or otherwise restrained. The officers were polite  
9 throughout the questioning and did not raise their voices. Petitioner apparently had some  
10 experience with the police department, because she admitted that her fingerprints were on file.  
11 (Interrogation at 11.) Petitioner was very alert at the beginning of the interrogation but became  
12 less animated as the process went on, eventually putting her head down on the table in front of  
13 her and refusing to look at the interrogating deputies. Although petitioner attributes her behavior  
14 in this regard to pain medication, the state appellate court observed that “notably lacking in the  
15 defendant's showing is a development of or corroboration of her claim to have taken pain pills for  
16 her back.” (Opinion at 30.) It appeared to the undersigned that petitioner was simply did not  
17 want to look at the deputies while the questioning was going on, most likely because she was  
18 embarrassed to be discussing her part in the murder of Dixon. Petitioner did not appear to be  
19 unable to focus or concentrate, despite her apparent fatigue, and there is no evidence she was  
20 disoriented or unusually susceptible to police pressure. Further, as discussed above, this court  
21 has concluded that there was no violation of Miranda during the interrogation.<sup>17</sup>

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24 <sup>17</sup> If the detectives had violated Miranda, this would affect whether petitioner’s  
25 confession was voluntary. See Clewis v. Texas, 386 U.S. 707, 709 (1967) (Miranda violations  
26 are relevant on the issue of the voluntariness of a confession); Collazo, 940 F.2d at 418 (“a  
breach of [Miranda] rules not only has Miranda implications, but traditional voluntariness  
implications as well” because a failure to comply with Miranda aggravates coercive tactics).

1           The detectives who interrogated petitioner told her they thought she was involved  
2 in the murder and stated that if she failed to explain her involvement they would have to bring  
3 her mother and aunt to the police station and ask them what petitioner had told them about the  
4 murder. (Interrogation at 13, 18, 20.) They asked petitioner whether she wanted to put her  
5 family through that ordeal. (*Id.* at 21.) One detective told petitioner he would “have to drag  
6 [them] down here and try to get it out of them,” that he would “have to interrogate them until I  
7 get it out of them,” and that her family would “feel bad” if they had to implicate her. (*Id.* at 21,  
8 23.) Immediately after the detective made these statements, petitioner asked whether she could  
9 come back for questioning the next day. In response to petitioner’s query, she was told that “we  
10 can’t put this off,” that “tomorrow is not gonna make any difference,” and that “today is the day  
11 to tell the truth.” (Interrogation at 23-24.) In context, petitioner was told that if she refused to  
12 continue with the interrogation, her relatives would be questioned by police.

13           As noted above, threats against a suspect’s family members can render a  
14 confession involuntary. As explained by one court:

15           The tactic of inducing a suspect to talk by threatening adverse  
16 consequences to a friend or loved one is a particularly pernicious  
17 technique. In *Lynum v. Illinois*, 372 U.S. 528, 534, 83 S.Ct. 917,  
18 9 L.Ed.2d 922 (1963), the Supreme Court held that when police  
19 told a defendant that if she did not talk her children would be taken  
20 away and state financial assistance to them would be cut off her  
21 statement was involuntary. In *Spano*, 360 U.S. at 323, 79 S.Ct.  
1202, the Court found a confession involuntary when a police  
trainee, who was a childhood friend of the defendant, told the  
defendant that he could lose his job and his family would suffer  
unless defendant confessed. See also *Rogers*, 365 U.S. at 535-36,  
81 S.Ct. 735 (discussing police threat to take defendant's wife, who  
suffered from arthritis, into custody).

22           A strong argument can be made that falsely informing a suspect  
23 that his failure to confess will cause a friend or loved one to suffer  
24 serious adverse consequences has a substantial potential for  
25 precipitating a false confession and should be prohibited. See  
26 Interrogation, *supra*, at 1241. A suspect confronted with such a  
misrepresentation might easily be led to believe that protecting a  
friend or loved one from imminent harm was more important than  
protecting himself from the consequences of a confession.  
However, a police officer's suggestion of possible adverse

1 consequences to a suspect's friend or loved one is not always  
2 improper. Sometimes such a suggestion may be an honest  
3 statement of a possible outcome. If, for example, police find drugs  
4 in a common area of a home shared by a husband and wife, and, in  
the absence of an admission from one spouse, could properly seek  
charges against both, it would be entirely proper for police to  
disclose this information during an interrogation.

5 Thus, when considering whether threats of adverse consequences  
6 to a suspect's friend or loved one constitute unconstitutional police  
7 coercion, a variety of factors are likely to be relevant: (1) whether  
8 the officers actually intended to take action against the friend or  
9 loved one or whether the threat constituted a misrepresentation; (2)  
whether there was a legitimate basis for taking action against the  
friend or loved one; (3) the severity of the threatened action; and  
(4) whether the friend or loved one suffered from an infirmity that  
would render him or her particularly vulnerable to official action.

10 United States v. Rodgers, 186 F. Supp.2d 971, 976 (E.D. Wis. 2002).

11 This court concludes that the detectives' statements about bringing petitioner's  
12 mother and aunt to the station to be questioned, although hard-hitting, did not rise to the level of  
13 an improper threat that would render petitioner's confession involuntary. In United States v.  
14 McShane, 462 F.2d 5, 6 (9th Cir. 1972), the Ninth Circuit concluded that the police did not  
15 coerce the defendant's confession when they took his girlfriend to the station for questioning.  
16 See also Vogt v. United States, 156 F.2d 308, 312 (5th Cir. 1946) (a confession was deemed to  
17 be voluntary where the officers told an accused man they were going to bring his wife to the jail  
18 for questioning because "[t]he fact that an accused undertakes to shoulder the entire burden in  
19 order to exculpate someone else does not, of itself, render his confession involuntary and  
20 invalid.") Here, the police did not threaten any of petitioner's family members with arrest, nor  
21 did they actually bring anyone to the police station prior to making their statements to petitioner.  
22 Although the statements made by the detective were admittedly heavy-handed, they do not  
23 appear to the court to be so harsh that they would have caused petitioner to lose self-direction.  
24 Rather, the police merely informed petitioner of the consequences of a decision not to continue  
25 with the interrogation: her relatives would have to be questioned because the police knew they  
26 had information about petitioner's role in the crime under investigation. The statements were a

1 fair prediction of the likely consequences of petitioner's failure to cooperate, since it appears that  
2 petitioner's mother had turned her in to the police. Under these circumstances, it would have  
3 been reasonable for the authorities to question the mother and petitioner's other relatives to  
4 obtain whatever other information they might have had relevant to the investigation.

5 After a review of the entire interrogation, this court concludes that petitioner's  
6 statements were not involuntarily made. Considering the entire record, petitioner's statements  
7 appeared to be "the product of a rational intellect and a free will." Townsend, 372 U.S. at 307.  
8 The state appellate court's decision that petitioner's confession was voluntary was not contrary to  
9 federal precedent or an "unreasonable determination of the facts in light of the evidence  
10 presented in the state court proceeding." 28 U.S.C. § 2254(d)(2). Accordingly, petitioner is not  
11 entitled to relief on her claim that here statements were involuntary.

### 12 3. Admission of Confession for Impeachment Purposes

13 Respondents argue that even if petitioner's confession was obtained in violation  
14 of Miranda, it was properly admitted into evidence at her trial because it was voluntary and was  
15 used only to impeach her testimony. (Answer at 21.)

16 A voluntary statement taken in violation of Miranda may be introduced at a  
17 federal criminal trial for impeachment purposes. Harris v. New York, 401 U.S. 222, 226 (1971);  
18 Doody v. Schriro, 548 F.3d 847, 860 n.13 (9th Cir. 2008). Cf. Henry v. Kernan, 197 F.3d 1021,  
19 1024 (9th Cir. 1999) (trial court erred in admitting post-Miranda statements under guise of  
20 impeachment when the sheriff's officers "set out in a deliberate course of action to violate  
21 Miranda," and the primary use of the statements was to establish an essential element of the  
22 crime charged). On the other hand, involuntary statements are excluded for all purposes. Pollard  
23 v. Galaza, 290 F.3d 1030, 1033 (9th Cir. 2002).

24 A review of the record reflects that evidence of petitioner's confession was  
25 introduced during the prosecutor's cross-examination of petitioner and during the defense case of  
26 her co-defendant and husband, Travis Reay, when he called one of the interrogating detectives

1 (Detective Minter) as a witness. (RT at 759-63, 776-86, 789-811, 820-27, 1197, 1202-22.)<sup>18</sup>

2 After Detective Minter had concluded her testimony, the prosecutor and petitioner's counsel  
3 stipulated that if she were recalled, Detective Minter would testify that petitioner made certain  
4 statements during her interrogation regarding why she stabbed the victim and whether Travis  
5 Reay stabbed the victim. (Id. at 1255-57.) Finally, the prosecutor referred to petitioner's  
6 interrogation and confession fairly extensively during his closing argument, in an attempt to  
7 convince the jury that petitioner had more involvement in the murder than she described in her  
8 trial testimony. (Id. at 1291-98.)

9 In her opening brief on appeal, petitioner argued that her statements to police were  
10 involuntarily made and were therefore inadmissible at trial for all purposes. (Lodged Doc. 23 at  
11 67.) In the alternative, she argued that assuming the statements were properly admitted for  
12 impeachment purposes, the trial court should have instructed the jury pursuant to CALJIC No.  
13 2.13.1 that the statements were relevant only to her credibility and not as substantive proof of her  
14 guilt. (Id.) Petitioner also argued that her statements to police were used by the prosecutor in his  
15 closing argument to demonstrate her guilt, even though they were ostensibly admitted under the  
16 guise of impeachment. (Id. at 70, 78-80.) In his reply brief on appeal, respondent argued as  
17 argued here, that petitioner's voluntary confession was properly admitted as impeachment  
18 evidence, even if it was obtained in violation of Miranda. (Lodged Doc. 2, lodged in Travis Reay  
19 habeas, at 66.) The California Court of Appeal did not address this issue, finding instead that no  
20 Miranda violation occurred during petitioner's interrogation and that her confession was  
21 voluntary. (Opinion at 26-30.)

22 It is true that petitioner's statements to police were not introduced in the  
23 prosecution's case-in-chief. However, their admission was not strictly limited to purposes of  
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25 <sup>18</sup> Although petitioner had previously filed an unsuccessful motion to suppress her  
26 confession, her trial counsel did not raise any objection when Detective Minter was called to the  
witness stand. (Id. at 1196-97.)

1 impeachment either. As described above, petitioner's statements were used by the prosecution  
2 at least in part, to bolster the prosecution theory that petitioner committed premeditated murder.  
3 In any event, because this court has concluded that petitioner's constitutional rights were not  
4 violated during her interrogation, her statements were properly admitted both as substantive  
5 evidence against petitioner and also to impeach her testimony.

6 CONCLUSION

7 Accordingly, for all of the foregoing reasons, IT IS HEREBY RECOMMENDED  
8 that petitioner's application for a writ of habeas corpus be denied.

9 These findings and recommendations are submitted to the United States District  
10 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty  
11 days after being served with these findings and recommendations, any party may file written  
12 objections with the court and serve a copy on all parties. Such a document should be captioned  
13 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections  
14 shall be served and filed within ten days after service of the objections. The parties are advised  
15 that failure to file objections within the specified time may waive the right to appeal the District  
16 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

17 DATED: May 22, 2009.

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DALE A. DROZD  
UNITED STATES MAGISTRATE JUDGE

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